GARY K. NELSON, THE ATTORNEY GENERAL
STATE CAPITOL
PHOENIX, ARIZONA

January 20, 1972

DEPARTMENT OF LAW OPINION NO. 72-4 (R-23)

REQUESTED BY: THE HONORABLE DOUGLAS S. HOLSCLAW
Arizona State Senator

QUESTIONS:

1. Do the Arizona Revised Statutes governing air pollution control give authority to the State Health Commissioner to negotiate with smelters to control pollution by curtailing production to meet ambient air pollution standards as an alternative to complying with existing emission standards?

2. Are the proposed amendments to the sulfur emission regulations for copper smelters, as enumerated below, within the authority of the State Board of Health as delineated in A.R.S. § 36-1707?

3. Would compliance with ambient air quality standards, as outlined in the proposed amendment to the sulfur emission standards, be sufficient to obtain adequate enforcement procedures against any polluter-violator?

ANSWERS:

1. No.

2. No.

3. See body of opinion.

A.R.S. § 36-1700.B, enumerating legislative policy, states:

> "* * * Those industries emitting pollutants in the excess of the emission standard set by the state board of health,

division of air pollution control, shall bring their operations into conformity with the standards with all due speed.* * *"

A.R.S. § 36-1707.A, dealing with rules and regulations to be enacted by the State Board of Health for the prevention, control and abatement of air pollution, provides as follows:

"A. Within ninety days after the effective date of this section, the board of health shall adopt such rules and regulations as it determines are necessary and feasible to reduce the release into the atmosphere of air contaminants originating within the territorial limits of the state or any portion thereof and shall adopt, promulgate, modify, and amend reasonable standards for the quality of, and emissions into, the ambient air of the state for the prevention, control and abatement of air pollution. Additional standards shall be established for particulate matter emissions, sulfur dioxide emissions, and other air contaminant emissions determined to be necessary and feasible for the prevention, control and abatement of air pollution. In fixing such standards the board shall give consideration but shall not be limited to:

"1. The latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on health and welfare which may be expected from the presence of an air pollution agent, or combination of agents in the ambient air, in varying quantities.

"2. Atmosphere conditions and the types of air pollution agent or agents which, when present in the atmosphere,

may interact with another agent or agents to produce an adverse effect on public health and welfare.

"3. The preservation and development of the economy of the state.

"4. Securing, to the greatest degree practicable, the enjoyment of the natural attractions of the state and the comfort and convenience of the inhabitants."

In addition to ambient air quality standards for sulfur dioxide, emission standards have been established for sulfur emission from primary copper smelters at 90% control based on the feed of sulfur (Regulation 7-1-6.3). The following amendment to those standards is presently under consideration by the State Board of Health:

"B. AN ALTERNATE TO THE REQUIRED 90 PERCENT CONTROL OR 10 PERCENT ALLOWABLE EMISSIONS MAY BE USED. THIS ALTERNATE IS THE COMBINATION OF LESS POSITIVE PROCESS CONTROL METHODS AND EQUIPMENT COUPLED WITH CURTAILMENT IN PRODUCTION.

"1. TO IMPLEMENT THIS ALTERNATE, THE COMMISSIONER SHALL NEGOTIATE AN AGREEMENT WITH EACH SMELTER CONCERNING THE BALANCE BETWEEN PRODUCTION CURTAILMENT AND POLLUTION CONTROL.

"2. SUCH AGREEMENT SHALL PROVIDE FOR COMPLIANCE AT ALL TIMES WITH AMBIENT AIR QUALITY STANDARDS.

"3. EACH PARTICIPATING SMELTER SHALL INSTALL IN ITS STACK, OR STACKS, MONITORS WHICH WILL MEASURE AND RECORD SULFUR OXIDE CONCENTRATIONS, FLOW RATE OF THE EFFLUENT

GASES, AND TEMPERATURE OF THE EMISSIONS. THESE DATA SHALL BE TRANSMITTED TO THE DIRECTOR."

Administrative agencies are endowed with quasi-legislative powers and functions often in conjunction with power judicial in nature. However, the essential legislative functions may not be delegated to administrative agencies, and they are precluded from legislating in the strict sense. State v. Marana Plantations, 75 Ariz. 111, 252 P.2d 87 (1953). The most pervasive legislative power conferred upon administrative agencies is the power to make rules and regulations. United States v. Grimaud, 220 U.S. 506, 31 S.Ct. 480, 55 L.Ed. 563 (1910). But no legislative body may delegate to administrative agencies the essential legislative powers vested in it, except when authorized by the Constitution. Sandstrom v. California Horse Racing Board, 31 Cal.2d 401, 189 P.2d 17, 3 A.L.R.2d 90; cert. den. 335 U.S. 814, 69 S.Ct. 31, 93 L.Ed. 369; reh. den. 335 U.S. 905, 69 S.Ct. 404, 93 L.Ed. 439 (1948).

The rule-making power which may be conferred is the power to make reasonable rules and regulations not inconsistent with law and subject to the implied constitutional limitation that administrative agencies must not legislate. Marcet v. Board of Plumbers' Examination and Registration, 249 Ala. 48, 29 So.2d 333 (1947). The delegation of power to make rules and regulations cannot extend to the making of rules which subvert the statute reposing such power or which are contrary to existing laws or repeal or abrogate statutes. Blatz Brewing Co. v. Collins, 69 Cal.App.2d 639, 160 P.2d 37, anno. 79 L.Ed. 491 (1945); State v. Burdge, 95 Wis. 390, 70 N.W. 347 (1897).

A rule or regulation which is broader than the statute empowering the making of the rule or which oversteps the boundaries of interpretation of a statute by extending or restricting the statute cannot be sustained. Administrative regulations which go beyond what the Legislature has authorized or conflict with the statute transferring the power are void. Medical Properties, Inc. v. North Dakota Board of Pharmacy, 80 N.W.2d 87 (N.D. 1956).

Where executive officers or bodies are charged with the administration of statutes, the Legislature must ordinarily prescribe a policy, standard or rule for their guidance and may not vest them with arbitrary or uncontrolled discretion with regard thereto. 16 C.J.S., Constitutional Law, § 138; Southern Pacific Company v. Cochise County, 92 Ariz. 395, 377 P.2d 770 (1963); Camerena v. Department of Public Welfare, 9 Ariz.App. 120, 449 P.2d 957 (1969), vacated 106 Ariz. 30, 470 P.2d 111 (1970).

Examples of delegation of legislative power without imposition of adequate standards are as follows:

1. State v. Marana Plantations, supra. Board of Health authorized to "regulate sanitation and sanitary practices in the interests of public health";

2. South Carolina State Highway Department v. Harbin, 226 S.C. 585, 86 S.E.2d 466 (1955). Highway Department authorized to suspend driver's license "for causes satisfactory" to it;

3. State, ex rel. Continental Oil Co. v. Waddill, 318 S.W.2d 281 (Mo. 1958). City planning committee given unlimited power, without a guiding standard to grant or deny building permits in certain cases.

A.R.S. § 36-1707.A dictates that the State Board of Health adopt inter alia sulfur dioxide emission standards utilizing the criteria set out therein. In establishing standards and guidelines for the Board to utilize in adopting those regulations, the Legislature has limited the Board's discretion in exercising its quasi-legislative function. Wells-Stewart Construction Co. v. Martin Marietta Corp., 103 Ariz. 375, 442 P.2d 119 (1968); DeHart v. Cotts, 99 Ariz. 350, 409 P.2d 50 (1965).

In the instant case, the proposed amendments would delegate from the State Board of Health to the State Health Commissioner the authority to grant non-compliance with the

present emission standards by negotiation with each smelter regarding curtailment in production. The only guideline provided is compliance with already applicable ambient air quality standards.

The proposed amendment encounters several defects. The general power to suspend laws is legislative in nature, and an attempt to confer such power on administrative agency or employee thereof unless based on some condition, contingency, exigency, or state of facts declared by the legislative enactment to be sufficient to warrant suspension is an unlawful delegation of power. Winslow v. Fleischner, 12 Ore. 23, 228 P. 101, 34 A.L.R. 826 (1924); Hernandez v. Frohmiller, 68 Ariz. 242, 204 P.2d 854 (1949).

Additionally, a problem exists where a board or agency attempts to delegate to its subordinate power vested by statute in that board or agency. Administrative bodies and officers cannot alienate, surrender or abridge their powers and duties, or delegate authority and functions which under the law may be exercised only by them. Although administrative bodies may delegate merely ministerial functions, in the absence of a statute permitting, they cannot delegate powers and functions discretionary in character or which require the exercise of judgment. Devol v. Board of Regents, 6 Ariz. 259, 56 P. 737 (1899); Anderson v. Grand River Dam Authority, 446 P.2d 814 (Okla. 1968).

If an administrative board delegates to an employee authority which under the law may only be exercised by the board itself, such delegation is invalid, and actions taken thereunder are void. School District No. 4 v. Industrial Commission, 194 Wis. 342, 216 N.W. 844 (1927); State, ex rel. R. R. Crow and Co. v. Copenhaver, 64 Wyo. 1, 184 P.2d 594 (1947); Levine v. Perry, 204 Ga. 323, 49 S.E.2d 820 (1948); State, ex rel. DeBarge v. Cameron Parish School Board, 202 So.2d 34 (La. 1967).

In Schecter v. County of Los Angeles, 65 Cal.Rptr. 739 (1968), a civil service commission delegated the duty of classification of positions to an employee of the commission. The court said:

> "The general rule under the maxim 'delegatus non potest delegare' is that a delegated power, when made subject to the delegatee's judgment or discretion, is purely personal and may not be further delegated in the absence of express statutory authorization. (Morton Bros. v. Pacific Coast Steamship Company, 122 Cal. 352, 353-355, 55 P. 1; Webster v. Board of Education, 140 Cal. 331, 332, 73 P. 1070; Shreveport Engraving Co. v. United States, (1944, 5th Cir.) 143 F.2d 222, 226.) Merely administrative and ministerial functions may be delegated to assistants whose employment is authorized, but there is no authority to delegate acts discretionary or quasi-judicial in nature. An administrative board cannot legally confer upon its employees authority that under the law may be exercised only by the board. (House v. Los Angeles County, 104 Cal. 73, 79, 37 P. 796; Holley v. Orange County, 106 Cal. 420, 39 P. 790; Vita-Pharmacals, Inc. v. Board of Pharmacy, 110 Cal.App.2d 826, 830-831, 243 P.2d 890; Shreveport Engraving Co. v. United States, supra, 2 Am.Jur.2d 52-53.)

It would appear that the Legislature, in A.R.S. § 36-1707 has dictated that the State Board of Health adopt sulfur dioxide emission standards and established guidelines to be followed in adopting those standards. The proposed amendment to the sulfur emission standards conferring authority on the State Health Commissioner, an employee of the Department, to allow exemption from the emission standards through negotiations with each smelter, without limiting guidelines, would be contrary to the legislative expression in A.R.S. § 36-1707 and therefore invalid.

Additionally, A.R.S. § 36-1707 dictates that emission standards be established by the State Board of Health after notice and public hearing. To delegate that authority to the State Health Commissioner, requiring the exercise of discretion and application of his independent judgment, would constitute an invalid delegation based on the authority cited above.

In relation to enforcement procedures, A.R.S. § 36-1707.E provides a misdemeanor penalty for violation of ambient air quality standards as well as emission standards. It is obvious that emission violations would be easier to enforce from an evidentiary standpoint than an ambient air quality standard involving identification and tracing a particular pollutant and its degree to its emission source.

Respectfully submitted,

GARY K. NELSON
The Attorney General

GKN:TAM:ell